SUPREME COURT OF THE UNITED STATES.

No. 68.

JOSEPH SWIFT, PLAINTIFF,

vs.

GEORGE W. TYSEN.

ON A CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT U. S. SOUTHERN DISTRICT OF NEW YORK.

At a stated term of the Circuit Court of the United States of America for the Southern District of New York in the second circuit, held at the City Hall in the City of New York, on Wednesday the third day of June, in the year of our Lord one thousand eight hundred and forty.

Present the honorable Smith Thompson, associate judge of the Supreme Court of the United States, and the honorable Samuel R. Betts.

CIRCUIT COURT OF THE UNITED STATES
For the Southern District of New York.

JOSEPH SWIFT, a Citizen of the State of Maine,
vs.
GEORGE W. TYSEN, a Citizen of the State of New York.

THE action in this cause being upon a bill of exchange dated at Portland, (in Maine,) the first day of May, 1836, for $1,540 30, payable six months after date and grace, drawn by Nathaniel Nor-

ton and Jairus S. Keith, upon and accepted by the defendant, at the city of New York, in favor of *the* order of Nathaniel Norton, and by him endorsed to the plaintiff; the defendant at the trial admitted the signature of himself, as such acceptor on the bill, and the signature of said Nathaniel Norton, as endorser thereof to the plaintiff, and the plaintiff proved the amount of interest thereon to be $261 76 by a witness, and also that such principal and interest amounted to $1,802 06, and after reading said bill and endorsement in evidence, rested his cause. The defendant then read in evidence the answer, and *further* answer of the plaintiff in this suit to a bill for a discovery, &c., filed on the equity side of this court by the defendant against the plaintiff, which answer and further answer were in the words and figures following, to wit:

CIRCUIT COURT OF THE UNITED STATES
For the Southern District of New York, In Equity.

The answer of Joseph Swift, defendant, a citizen of the State of Maine, who has not been served with process to appear and answer in this suit in the State of New York, or elsewhere, and who appeareth therein specially *for* the only purpose of making the discovery prayed for in the bill of complaint in this suit from him, and of answering as to the matters in said bill, relating to the injunction prayed for therein, and who reserves his right to contest the jurisdiction of this honorable court over him in said suit for any other purpose than to determine whether such injunction shall be retained, and answering accordingly to all that part of the bill of complaint aforesaid of George W. Tysen, a citizen of the State of New York, complainant, relating to *said* discovery and injunction.

This defendant Joseph Swift, answering as above mentioned, saving and reserving to himself all and all manner of benefit and advantage of exception to the many errors and uncertainties, and other imperfections in the aforesaid part of said bill of complaint contained for answer to the same, or unto so much thereof as he is advised it is material and necessary for him to make answer unto, answers and says, that on the fourteenth day of April, in the year of our Lord one thousand eight hundred and thirty-six, this defendant was cashier of *the* Maine Bank in Portland, a corporation for banking business duly and legally established by the law and authority of the State of Maine, and under bonds for the faithful discharge of his duty as cashier as aforesaid; that on said fourteenth day of April he received in a letter, as cashier of said bank, from George Crosby, cashier of the Augusta Bank, a similar corporation in the town of Augusta, in said state of Maine, a note of hand, of which the following is a true and perfect copy, to wit:

"Augusta, 4th May, 1835, *value* received, we jointly and severally promise to pay G. C. Child, or order, twenty-seven hundred

seven 47–100 dollars, at either of the banks in Portland in one year, with interest."

"NATHL. NORTON."
"JAIRUS S. KEITH."

"Att. MARK MASON."

$2,707 47
Int. 163 80

$2,871 27

This note was endorsed thus:

"G. C. CHILD."

"Pay to the order of JOSEPH SWIFT, Esq., *Cashier*."
"GEO. CROSBY, *Cashier*."

This note was enclosed in a letter of which the following is a true copy.

"Augusta Bank, April 14, 1836.

"Sir, I enclose for collection G. H. Cheney's note and int.
"May 24, 894 80. Nathl. Norton & J. S. Keith."
" 7, 2,871 27. "Respectfully yours,"
"GEO, CROSBY, *Cashier*."

"J. SWIFT, ESQ., *Cashier*."

Through my inadvertence the makers and endorsers of this note were not notified when the note fell due, to wit, on the seventh day of May, in the year of our Lord one thousand eight hundred and thirty-six, nor was any legal demand made on the makers of *said* note, nor any legal notice given the said endorsers of the neglect of the makers to pay the same note at its maturity.

This omission of duty on the part of said defendant was not discovered until the nineteenth day of the same month, and the said Augusta Bank charged the amount of said note to the said Maine Bank, presuming it paid, and collected and paid over said amount to the holder and owner of said note. In consequence of which omission the said Maine Bank were legally liable and compelled to pay the Augusta Bank *aforesaid*, the said amount of said note. This liability on the part of said Maine Bank, having been incurred in consequence of the aforesaid omission and neglect of said defendant, this defendant was thereupon compelled to secure and pay said Maine Bank the full amount of said note, which he did, on the twenty-third day of May, in the year of our Lord one thousand eight hundred and thirty-six, and to assume and take the note aforesaid as his, the said defendant's only security for the amount which he had been compelled to pay and secure to *the* Maine Bank as aforesaid. This defendant then called on Nathaniel Norton, one of the signers and makers of said note, for payment of the same, who having stopped payment before that time, could not or would not pay the amount of said note, but gave to this defendant, on being pressed therefore, two drafts made by himself and Jairus S. Keith aforesaid, for the sum of one thousand five hundred

and forty dollars and thirty cents each, due and payable on the fourth day of November, one thousand eight hundred and thirty-six, one of said drafts *accepted* by George W. Tysen, on whom it was drawn, and the other of said drafts accepted by George Catlin, both said Tysen and Catlin resident in the city of New York, as this defendant is informed. The draft accepted by said George Catlin, purported to be per Charles Graham, Junior, and at the time when the defendant received the said drafts in the manner aforesaid, the said Norton assured this defendant that he had no doubt said drafts would be promptly paid at maturity — that the said Tysen and Catlin had made their previous payments *promptly*; that the money for which these drafts were given was justly due to them in the month of May, in the year one thousand eight hundred and thirty-six, but that they had, at the request of said Tysen and Catlin, extended the time of payment to the fourth day of November of said last mentioned year. This defendant further answering, alleges that he received these drafts in payment for the aforesaid note, the amount of which, as he has before stated, he had secured to be paid to said Maine Bank, and at the time of *said* transaction, this defendant understood from said Norton, that he, said Norton, had made sale of some land to a company in New York, and that the acceptances received by this defendant as aforesaid, were given for the second or third payment that had become due; that Norton had at said time in his possession and hands several other acceptances, from among which were selected the two aforesaid acceptances of Catlin and Tysen, but the names of the parties to the other acceptances are not now recellected by said defendant. This is the only private transaction the *defendant* ever had with said Norton, and with the other maker Keith, he never had any acquaintance, and does not recollect to have seen him untill this present day.

And further answering, this defendant alleges that he had no knowledge other than as he has before stated, of any of the transactions of the said Norton and Keith — that he received the said drafts in payment for the aforesaid note, with the full belief that the said drafts were justly due according to their tenor. And he absolutely denies that he holds said drafts in trust for the *said* Norton and Keith, or either of them. And this defendant absolutely denies that he had any knowledge, further than is before stated of the circumstances under which said drafts were made and accepted; and said defendant further avers and alleges that he has no other or different security for the money which as aforesaid he has been compelled to secure and pay to said Maine Bank.

And said defendant further answering, alleges that he had no knowledge whatever but that any contract made by said Norton and Keith with said Tysen and others, had been on the part of said Norton and Keith fully fulfilled and *kept* and carried into effect, and that this defendant has no knowledge or belief that said drafts were obtained by fraud, or any fraudulent pretences or

representations on the part of said Norton and Keith, or either of them.

And said defendant fully and absolutely denies all combination or confederacy with said Norton and Keith, or either of them, to defraud the said acceptors of said drafts, or any other person or persons whatsoever.

And said defendant absolutely denies that he had any knowledge or belief, that said Norton and Keith had *no* title to the lands contracted to be sold by them to any one, and he avers that he had nó knowledge of any transactions of said Norton and Keith other than he has before stated in this his said answer.

And the said defendant further avers, that he has fully stated all the particulars of the manner in which he became the owner of said drafts, and of the consideration by him paid therefor; that he has no other securities in his hands than the drafts aforesaid, and that he relies *only* on said drafts for his indemnity for the money so by him paid as aforesaid, and that no other securities whatever have been or are in the hands of said Swift, to be applied to the liquidation of the said sum of money, or in the hands of any other person in trust for him, said defendant, or for the purpose of paying said money so as aforesaid, paid by said defendant to said bank.

And the defendant avers, that said suit by him commenced against said Tysen, is prosecuted for his the said defendant's *sole* benefit, and to recover his indemnity for the money so as aforesaid paid by him to said bank.

And he prays that the injunction aforesaid upon his said suit may be removed, and he permitted to prosecute the same to final judgment and execution, and that he may be hence dismissed with his legal and proper costs in answering the complaint of said bill of said George W. Tysen.

Signed JOSEPH SWIFT.
THOMAS FESSENDEN,
Sol'r for Joseph Swift, and of Counsel for him.

UNITED STATES OF AMERICA,
District of Maine, ss.

Be it remembered, that *on* this 20th day of September, 1838, personally came before me the above named Joseph Swift, and made solemn oath that the matters of fact stated in his answer by him above subscribed, so far as they purport to be stated on his own knowledge, are true, and so far as they purport to be stated on information from others, are by him believed to be true.

ASHUR WARE,
Judge of the United States for the District of Maine.

CIRCUIT COURT OF THE UNITED STATES,
For the Southern District of New York. In Equity.

"The further answer of Joseph Swift, defendant, a citizen of the State of Maine, who has not been served with process as stated in his former answer in this suit, and has appeared therein specially as stated in said former answer, and reserves the right therein stated to be reserved, to the bill of complaint in this cause, as it respects the special point and matter specified in the order entered in this cause on the nineteenth day of November, one thousand eight hundred and thirty-eight.

"This defendant further answeriug as above mentioned, saving and *reserving* all and all manner of benefit and advanatge of exception as stated in said former answer, answereth and saith—

"That the drafts or acceptances which he received of the said Norton and Keith, as specified in his former answer already made and given in this cause, namely two drafts made by said Norton and Jairus S. Keith aforesaid, for the sum of one thousand five hundred and forty dollars and thirty cents each, due and payable on the fourth day of November, one thousand eight hundred and thirty-six — one of said drafts accepted by *George* W. Tysen, on whom it was drawn, and the other of said drafts accepted by George Catlin, both said Tysen and said Catlin resident in the city of New York, as this defendant is informed, the draft accepted by said George purporting to be per Charles Graham, Junior, were given, endorsed and delivered to this defendant by said Norton and Keith, on the last day of May or the first day of June, in the year one thousand eight hundred and thirty-six, and about five months before said drafts became due and payable *according* to the tenor of the same drafts, and that he has always, and ever since said transfer and delivery, held said notes for the purposes specified by him in his former answer to said plaintiff's bill of complaint.

"JOSEPH SWIFT."

"Be it remembered, that on this 29th day of December, 1838, personally came before me the above named Joseph Swift, who is personally known to me, and made solemn oath that the facts stated in his above answer, so far as they purport to be stated on his own knowledge, are true, and so far as they purport to be stated on the information of others, are believed by him to be true.

"ASHUR WARE,
Judge of the United States for the District of Maine."

And then offered to prove that said bill of exchange was accepted by the said defendant as part consideration for the purchase of certain lands in the State of Maine, which said Keith and Norton represented themselves to be the owners of, and also represented

to be of great value and made certain estimates thereof, which were warranted to be correct, and also contracted to convey *a* good title thereof, and that the said representations were in every respect fraudulent and false, and said Keith and Norton had no title to the said lands, and were not and never had been able to make a title thereto, and said lands were of little or no value; whereupon the plaintiff, by his counsel, objected to the admission of said testimony, or any testimony as against the plaintiff impeaching or showing the failure of the consideration on which said bill was accepted under the facts aforesaid admitted by the defendant, and those proven by him by reading said *answers* in equity of the plaintiff in evidence. And the judges of this court divided in opinion on the point or question of law, whether under the facts last mentioned the defendant was entitled to the same defence to the action as if the suit was between the original parties to the bill, that is to say, the said Norton or the said Norton and Keith, and the defendant. And whether the evidence so offered in defence and objected to was admissible as against the plaintiffs in this action.

And thereupon *the* said point or question of law was at the request of the counsel for the said plaintiff, stated as above under the direction of the judges of this court to be certified under the seal of this court to the Supreme Court of the United States, at the next session thereof to be held thereafter, to be finally decided by the said last mentioned court,

New York, June, 1840.

UNITED STATES OF AMERICA,
Southern District of New York, ss.

I, Frederick J. Betts, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the documents annexed to this certificate are true copies of their respective originals on file and remaining of record in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York in [L. L.] the southern district of New York this eleventh day of January in the year of our Lord one thousand eight hundred and forty-one, and of the Independence of the United States the sixty-fifth.

FRED. J. BETTS,
Clerk.